APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 90-3706

LYNN MARTIN, Secretary of Labor,
Plaintiff-Appellant,

v.

LESLIE N. BEDELL and
BLUE WATER MARINE, CATERING, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

March 25, 1992

Wendy B. Bader, Willian J. Stone, Paula W. Coleman, Counsel, Appellate Lit., U.S. Dept. of Labor, Washington, D.C., Robert P. Davis, Sol. of Labor, U.S. Dept. of Labor, Dallas, Tex., for plaintiff-appellant.

Haywood H. Hillyer, III, Milling, Benson, Woodward, Hillyer, Pierson & Miller, New Orleans, La., for defendants-appellees.

Before WISDOM, HIGGINBOTHAM, and SMITH, Circuit Judges.

WISDOM, Circuit Judge:

This case presents the question whether the cooks employed by the defendant appellee, a caterer to boats providing offshore support to oil companies in the Gulf of

Mexico, are entitled to overtime pay under the Fair Labor Standards Act (FLSA). Because the income generated by those cooks must be attributed to their employer, the employer is bound to comply with the Act's overtime provisions. Because the district court's factual findings are insufficient to support its determination that the cooks do not fit within the narrow definition of "seaman" under the FLSA, we remand for further, limited factual findings. We therefore REVERSE the decision below as to the employer's exemption from enterprise coverage, and REMAND as to the cook's status as non-seaman, so that the district court may make necessary findings as to the work the cooks perform.

I. BACKGROUND

Blue Water Marine Catering, Inc. ("Blue Water") supplies cooks for "jack-up boats". Those boats provide offshore maintenance services for oil companies. Both parties concede that the oil and gas produced by those companies enter the stream of interstate commerce.

For the dates pertinent to this appeal, Blue Water paid its cooks a day rate. The Department of Labor, through its Wage and Hour Division, investigated Blue Water and determined that this form of payment violated the FLSA. The Secretary of the Department of Labor, Elizabeth Dole (now Lynn Martin), brought this suit to force Blue Water and its president, Leslie N. Bedell, to comply with the overtime provisions of the FLSA. Accordingly, we shall refer to the plaintiff/appellant as "Labor".

The district court held a one-day bench trial limited to Blue Water's liability. The court decided that neither the cooks as individuals nor Blue Water as an enterprise was covered by the FLSA. As to the cooks, it held that their work outside of Louisiana's territorial waters was outside the jurisdiction of the FLSA. When the cooks did work within those waters, the court held that the food they cooked (food that was consumed aboard) was not "goods

for commerce"; therefore, their services were not closely related to or directly essential to the production of goods for commerce, and were not covered by the Act. The court also held that Blue Water itself was excused from compliance because it fitted within the Act's exception for business establishments employing only immediate members of one family. Finally, the court held that the cooks, although they worked on seagoing vessels, did not fit within the FLSA's narrowly construed exemption of seamen. Labor appeals all but this last holding, which Blue Water challenges.

II. THE STATUTORY FRAMEWORK

The FLSA guarantees overtime pay to employees engaged "in the production of goods for commerce" ("individual coverage") *or* "employed in an enterprise engaged in commerce or in the production of goods for commerce" ("enterprise coverage").[1] *Either* individual *or* enterprise coverage is enough to invoke FLSA protection.[2]

Many exceptions temper the strictness of this rule. Relevant to the issue of enterprise coverage in this case is the "mom and pop" exception. The FLSA defines "enterprise engaged in commerce or in the production of goods for commerce" to exclude "any establishment which has as its only regular employees" members of one immediate

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[1] 29 U.S.C. § 207(a)(1) reads:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[2] Our finding that Blue Water is subject to enterprise coverage therefore values it unnecessary to consider the district court's decision on individual coverage.

family.[3] The sales of such an establishment are not included in determining the minimum amount of revenues that triggers the Act's application.[4] Labor's interpretive bulletins define an "establishment" to be a "distinct physical place of business".[5] The only employees who work at the home office establishment of Blue Water are Mr. Bedell, his wife, and her daughter. Without other "regular employees" their office in Gretna, Louisiana would be excluded from the Act as a "mom and pop" establishment.

There are also relevant exemptions from individual coverage. For example, an employer need not comply with the Act's overtime requirements if its employees are exempt under 29 U.S.C. § 213(b). One of those exemptions, § 213(b)(6), is for "any employee employed as a seaman".

III. ENTERPRISE COVERAGE AND THE "MOM AND POP" EXCLUSION

Applying the words "employer", "establishment", and "enterprise" under the FLSA can be confusing. Labor's own interpretations bravely attempt to define them.[6] In

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[3] 29 U.S.C. § 203(s)(2) provides:

> Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purposes of determining the annual gross volume of sales of any enterprise for the purposes of this subsection.

[4] *Id.*

[5] 29 C.F.R. § 779.23 (1990).

[6] 29 C.F.R. § 779.203 (1990) provides:

> The coverage, exemption and other provisions of the Act depend, in part, on the scope of the terms "employer," "establishment," or "enterprise." As explained more fully in Part 776 of this chapter, these terms are not synonymous. The term

general, "employer" is usually a person; "establishment" is a place of business; and "enterprise" is the business itself, a number of related activities done for a common business purpose.

For the times relevant to this case, no enterprise was subject to the FLSA unless its annual gross sales volume exceeded $250,000.[7] As we noted above, the Act excludes sales figures for a "mom and pop" establishment that regularly employs only immediate family members. The district court found that Blue Water's home office in Gretna, Louisiana was such an establishment: its sales figures, all generated from that establishment, would not count toward a finding of enterprise coverage. The court found that the jack-up boats on which the cooks are employed are separate establishments under the Act, but that the sales volume generated by the cooks' work in those establishments were attributable to Blue Water's home office. For that reason, those sales (which the court found to be greater than $250,000) do not count toward enterprise coverage. In so ruling, the court weaved two errors

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"employer" has been defined in the Act since its inception and has a well established meaning. As defined in section 3(d), it includes, with certain stated exceptions, any person acting directly or indirectly in the interest of an employer in relation to an employee. (See § 779.19.) The term "establishment" means a "distinct physical place of business" rather than "an entire business or enterprise." (See § 779.23) The term "enterprise" was not used in the Act prior to the 1961 amendments, but the careful definition and the legislative history of the 1961 and 1966 amendments provide guidance as to its meaning and application. As defined in the Act, the term "enterprise" is roughly descriptive of a business rather than of an establishment or of an employer although on occasion the three may coincide. The enterprise may consist of a single establishment (see § 779.204(a)) which may be operated by one or more employers; or it may be composed of a number of establishments which may be operated by one or more employers (see § 779.204(b)).

[7] 29 U.S.C.A. § 203(s)(1) (1978). In 1989 that figure was raised to $500,000. 29 U.S.C.A. § 203(s)(1)(A)(ii) (Supp.1991).

together. Unravelling them reveals two separate holdings by which the district court might have found, and by which we find as a matter of law, that Blue Water is subject to enterprise coverage under the FLSA.

The court erred first in the legal finding that, "while the cooks and galley hands are employees of Blue Water's enterprise, they are not employees of the Heritage Avenue [Bedell home office] establishment". The court found that "[n]one of the other regular employees of Blue Water ever set foot inside this establishment"; "the only regular employees of that establishment" are the three Bedell family members. It is not necessary, however, for cooks or for others ever to set foot in Blue Water's Gretna establishment to be its employees. It was error to deny that they *might* be employees of Blue Water's Gretna establishment.

The district court assumed that no one could be a "regular employee" of an establishment at which he never appears. Although the Act itself offers little guidance on this issue, we disagree. The question whether someone is the regular employee of an establishment is not answered, or not answered solely, by looking to whether he works *at* the establishment.[8] It is answered according to economic

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[8] Labor's interpretive bulletins state that employees of an exempt retail or service establishment can also be exempt even if they do not work *at* the establishment. 29 C.F.R. § 779.307 reads in pertinent part that

> such employees as collectors, repair and service men, outside salesmen, merchandise buyers, consumer survey and promotion workers, and delivery men actually employed by an exempt retail or service establishment are exempt from the minimum wage and overtime provisions of the Act although they may perform the work of the establishment away from the premises.

The bulletins also state that employees of a non-exempt establishment cannot become exempt simply by visiting exempt establishments on behalf of their employers. 29 C.F.R. § 779.310 provides that

> traveling auditors, manufacturers' demonstrators, display-window arrangers, sales instructors, etc., who are not "employed

reality, applied through factors with which this and other courts have attempted a legal definition of "employee".[9] Blue Water has never contended that its cooks are actually the employees of any other employer. Because they could be employees of the Blue Water enterprise without being employees of the Bedell establishment, however, we cannot say that they are employees of Blue Water's home office.[10]

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by" an exempt establishment in which they work will not be exempt merely because they happen to be working in such an exempt establishment, whether or not they work for the same employer. *Mitchell v. Kroger Co.*, 248 F.2d 935 (8th Cir.1957).

The mere location of employment is therefore not conclusive. A court should look to the economic reality, and not the location, of employment to determine who employs an employee.

[9] *See, e.g., Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir.1990) (citations omitted):

> For purposes of FLSA, determination of employee status focuses on economic reality and economic dependence. The "economic reality" test includes inquiries into:
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> > whether the alleged employer (1) has the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

[10] Based on the facts before us, we find it unlikely that the technical, and for obvious reasons necessary, control exerted over Blue Water's cooks by the masters of the jack-up boats would be sufficient to destroy the economic reality of their employment by Blue Water. Yet even if it were the case that the cooks are employed by the jack-up boat owners as well as by Blue Water, we note that under the FLSA an individual can be employed by one employer or by more than one joint employer. *Falk v. Brennan*, 414 U.S. 190, 195, 94 S.Ct. 427, 431, 38 L.Ed.2d 406 (1973); *Donovan v. Sabine Irrigation Co., Inc.*, 695 F.2d 190, 194 (5th Cir.1983); *Hodgson v. Griffin and Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.), *cert. denied*, 414 U.S. 819, 94 S.Ct. 43, 38 L.Ed.2d 51 (1973). 29 C.F.R. § 791.2 (1991) provides:

> (a) A single individual may stand in the relation of an employee to two or more employers at the same time under the

The Blue Water *enterprise*, however, is not exempt from FLSA coverage merely because the Bedell home office might be a statutory "mom and pop" establishment. The trial court's second error was its unsupported holding that, because the cooks are not employed at Blue Water's one establishment, then the revenues generated by their work in the jack-up boats must be attributed to that home office establishment. The court found, inconsistently, that Blue Water's *only* establishment is its home office, yet it also found that the cooks are employed at each jack-up boat. We find that if the cooks are not employed at the Bedell home office establishment, then the jack-up boats must constitute distinct establishments in the Blue Water enterprise.

It would be inconsistent with the remedial purposes of the FLSA to attribute the income generated by the work of the cooks on jack-up boats to the Bedell home and not to those establishments and the larger Blue Water enterprise. Otherwise, any business controlled by immediate family members could exclude its employees from FLSA coverage by segregating them, even though their labors were the employer's only source of income, from the home office. We read the "mom and pop" exclusion to exclude from coverage only "Mom", "Pop", their immediate relatives, and the revenues *their* work generates. An enterprise that otherwise meets the prerequisites of FLSA coverage (i.e., has gross annual sales greater than the statutory minimum) cannot avoid that coverage by em-

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Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. . . . [I]f the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act.

ploying only immediate family members at its home base, when a large pool of non-family employees generate the bulk of its income. In declaring that Blue Water's cooks worked at as many establishments as there are jack-up boats, the district court then erred by attributing the income earned by working on those establishments not to the Blue Water enterprise but to the one establishment in Gretna.

The appellee cannot have it both ways. Either Blue Water has one establishment that regularly employs a large number of unrelated employees, or it is an enterprise with many establishments; one of those establishments is exempt, but the income generated by work performed at its many other establishments should be attributed to the entire enterprise, and therefore count toward the dollar volume requirements of the FLSA. It is irrelevant which of these scenarios is true. Because the factual resolution of these issues would have no effect on the outcome, and because it is established that the revenues generated by the cooks' work are greater than the statutory minimum for enterprise coverage, we hold that Blue Water is subject to enterprise coverage as a matter of law.

IV. THE SEAMAN EXEMPTION

This Court has long been accustomed to a very broad definition of the word "seaman" for purposes of the Jones Act. This case reminds us, however, that the definition of seaman under the Jones Act is limited to that Act and its remedial goals.[11] In contrast, the remedial goals of the Fair Labor Standards Act lead us to read narrowly its exemptions, including the definition of "seaman".[12] A "seaman" is removed entirely from the Act's overtime pro-

[11] This Court has already decided that a seaman under the Jones Act is not a seaman under the FLSA. *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518 (5th Cir.1989).

[12] *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960).

visions. An employer has the burden of proving that its employees stand outside of this Act's very broad protection.[13]

Because employment solely on seagoing vessels does not necessarily make one a "seaman" under the FLSA, a court must look to the actual work performed. Our review of a district court's investigation of this question is limited to its findings of fact, which we accept unless they are clearly erroneous.[14] We review *de novo* the application of those facts to the law.[15]

In this case the district court found that Blue Water's cooks perform work essential to the operation of seagoing vessels traveling between Louisiana and the outer Continental Shelf. It also found that, "[w]hile aboard the vessel, the cooks are subject to the authority, direction, and control of the master of the vessel". Yet from these facts the district court found that the cooks are *not* seaman because their services are not "rendered primarily as an aid in the operation of a vessel as a means of transportation".[16]

This Court has decided two cases involving the "seaman" exemption.[17] Although neither case offers us much help here, our more recent case directs us to the interpretive bulletins of the Wage and Hour Division of the Department of Labor, which, in turn, rely heavily on our earlier case; those bulletins also provide an answer in this

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[13] *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 206, 86 S.Ct. 737, 747, 15 L.Ed.2d 694 (1966).

[14] *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714, 106 S.Ct. 1527, 1530, 89 L.Ed.2d 739 (1986).

[15] *Id.*

[16] Quoting 29 C.F.R. § 783.31; *Petroleum Treaters*, 876 F.2d at 521.

[17] *Petroleum Treaters*, 876 F.2d 518; *Walling v. W.D. Haden Co.*, 153 F.2d 196 (5th Cir.), *cert. denied*, 328 U.S. 866, 66 S.Ct. 1373, 90 L.Ed. 1636 (1946).

case. We give great weight to the consistent interpretations of those bulletins.[18] They allow the holding that in some cases a seagoing cook may not be a seaman.

The regulations state that a "seaman" is an employee who, "performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of [a] vessel as a means of transportation".[19] They also state that "[w]hether an employee is 'employed as a seaman', within the meaning of the Act, depends upon the character of the work he actually performs and not on what it is called or the place where it is performed".[20] When a worker performs both seaman's work and nonseaman's work, he is a seaman unless his nonseaman's work is substantial in amount.[21] Labor defines "substantial" as work that "occupies more than 20 percent of the time worked by the employee during the workweek".[22]

The regulations also provide:

> The term "seaman" includes members of the crew such as sailors, engineers, radio operators, foremen, pursers, surgeons, *cooks*, and stewards if, *as is the usual case*, their service is of the type described in § 783.31. In some cases it may not be of that type,

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[18] *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 297, 105 S.Ct. 1953, 1959, 85 L.Ed.2d 278 (1985); *Petroleum Treaters*, 876 F.2d at 521-22) ("The fact that the interpretation has not varied since the FLSA's enactment also entitles it to 'great respect'. *Chemehuevi Tribe of Indians v. Federal Power Comm'n*, 420 U.S. 395, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975).")

[19] 29 C.F.R. § 783.31 (1991), citing (among other cases) *Walling v. W.D. Haden Co.*

[20] 29 C.F.R. § 783.33 (1991), again citing *W.D. Haden Co.*

[21] 29 C.F.R. § 783.37 (1991).

[22] *Id.*

> in which even the special provisions relating to seaman will not be applicable.[23]

A cook is *usually* a seaman because he usually cooks *for* seamen. In this case that commonplace may well be untrue. It would appear that Blue Water's cooks primarily feed workers who are not involved in the navigation of the boat on which they live and from which they work.[24] Even though the district court was correct to look to whether the cooks' services do in fact aid the operation of vessels as means of transportation, it did not state its findings in terms sufficient to satisfy the standards of Labor's interpretive bulletins, to which we defer. We remand so that the district court may determine if the cooks spend more than 20% of their time preparing food for non-crew members. If they do, they are not seamen under the FLSA.

V. CONCLUSION

For the reasons stated above, we REVERSE in part, and REMAND to the district court for the limited factual findings made necessary by this opinion.

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[23] 29 C.F.R. § 783.32 (1990) (emphasis added).

[24] For example, in *W.D. Haden*, 153 F.2d at 199, we emphasized that the Act does not exempt seaman, but those "employed as seaman", a distinction we found more than tautological. We found that shell miners employed on a sea-going vessel "are employed more in industry than in shipwork". In this case, similarly, it seems likely that Blue Water's cooks are employed more in feeding industrial workers than in feeding ship workers. If more than 20% of their time is spent in the former, then they are intended beneficiaries of the FLSA. As we wrote in *W.D. Haden*, "[t]he entire Act is pervaded by the idea that what each employee actually does determines its application to him". *Id.*

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-1527

SECTION "E"

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor

versus

LESLIE N. BEDELL, an Individual and
BLUE WATER MARINE CATERING, INC., a Corporation

FINDINGS AND CONCLUSIONS

[Filed Aug. 9, 1990]

This is an action brought by the Secretary of Labor, United States Department of Labor, to enjoin defendants from violating provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, and to restrain the withholding of payment of overtime compensation which may be found by the court to be due employees under the Act, together with interest thereon at the rate provided by 26 U.S.C. § 6621 from the date any backwages became due until judgment is entered and at the rate provided by 28 U.S.C. § 1961 thereafter until paid and for costs of this action. Jurisdiction under the Act is uncontested.

These material facts are uncontested by the parties:

1. Defendant Blue Water Marine Catering, Inc. has been since prior to April 7, 1987, a corporation with a

place of business and doing business in Gretna, Louisiana.

2. Defendant Leslie N. Bedell resides in Gretna, Louisiana, where he has been since prior to April 7, 1987 the president of and has managed defendant Blue Water.

3. Those persons listed on defendant Blue Water's payroll records (Plaintiff's exhibit 1), were employees of defendant Blue Water within the meaning of the Act for the periods of time indicated thereon.

4. During the period since April 7, 1987, defendant Leslie N. Bedell acted directly or indirectly in the interest of defendant Blue Water in relation to its employees.

5. During the period since April 7, 1987, defendant Blue Water has been engaged in related activities performed through unified operation and common control for a common business purpose.

6. For all relevant time periods, defendant Blue Water employs employees, at least two of whom handle food and food pruducts, substantial quantities of which had been produced outside the State of Louisiana and were transported into the State of Louisiana prior to being handled by said employees.

7. For all relevant time periods, defendant Blue Water's employees who are employed as cooks prepare such food and food products for consumption by employees of its customers.

8. For all relevant time periods, defendant Blue Water's customers are service companies engaged in various activities in the oil fields offshore from Louisiana, such as diving, sandblasting, and painting old platforms, welding, and "snubbing"; these services are rendered to oil companies who produce oil and gas offshore from Louisiana, which oil and gas is stipulated by the parties to be subsequently transported into Louisiana, among other states, and part of which in raw or processed form is then trans-

ported outside the State of Louisiana or other state of original destination.

9. For all relevant time periods, defendant Blue Water has had an annual gross volume of sales made or business done of not less than $250,000.00, exclusive of excise taxes at the retail level which are separately stated.

Disputed material facts include:

1. Whether during the period since April 7, 1987, defendants have had employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

2. Whether during the period since April 7, 1987, defendants' employees engaged in catering to personnel on offshore oil rights have been engaged in commerce or in the production of goods for commerce within the meaning of the Act.

3. Whether, during the period from April 7, 1987 to present, defendants' employees have worked hours in excess of 40 in any workweeks; and, if so, whether during the weeks during which hours in excess of 40 were worked the employees were compensated at a rate of not less than one and one-half times their regular hourly rate for all hours in excess of 40.

The principal issues presented are:

1. Whether defendants' employees are covered by the Act because they are engaged in the production of goods for commerce.

2. Whether defendants' employees are covered by the Act because they are employed in an enterprise engaged in commerce.

3. Whether defendants' employees are exempt from the overtime provisions of the Act because they are seamen.

Production of Goods for Commerce

It would require a stretch of the imagination for the Court to consider that, with the evidence presented, the defendants' employees produced goods for commerce as contemplated by 29 U.S.C. § 207. The cooks' duties consist of cooking meals to be eaten by themselves and by the other persons in the crew of jack-up rig vessels. The food is prepared strictly for immediate, local consumption aboard the vessels; the meals are not put into the stream of commerce from offshore back into any state. The "goods" produced by the cooks are meals. The preparation of meals by the cooks in most instances does not constitute "production" within the meaning of the Act. This is the case when the meals are prepared offshore, outside of the territorial limits of Louisiana and of any other states. 29 U.S.C. § 202(j), defines "produced" as, in part, meaning ". . . handled, or in any other manner worked on *in any State*; . . ." (emphasis supplied). When, as is most often the case, the cooking is done outside of state boundaries, there is no "production" of the meals, but even where the jack-up rigs are located in Louisiana's territorial waters, and there is "production", this "production" is not "for commerce".

To be production "for commerce", the meals must be produced for subsequent movement ". . . among the several States or between any State and any place outside thereof." Inasmuch as the meals will be consumed immediately on the premises, i.e., on the jack-up rigs, they are not produced for subsequent movement in commerce.

Since the cooks are not engaged in services closely related to or directly essential to production of goods for commerce, they are not individually covered under the Act. *McLeod v. Threlkeld, Et Al*, 319 U.S. 491, 493, 63 S.Ct. 1248, 1250 (1943).

Enterprise Engaged in Commerce

Plaintiff contends that Blue Water is an enterprise engaged in commerce as that term is defined in 29 U.S.C. § 203(s). Defendants contend to the contrary and rely, *inter alia* on the "mom and pop" exclusion to enterprise coverage set forth in that section, as follows:

> Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

Blue Water's operations fit this exclusion. Evidence showed that the only establishment of Blue Water is its office, located in defendant Bedell's home at 799 Heritage Avenue in Gretna, Louisiana. The only regular employees of that establishment are Bedell, his wife, Doris, and Doris' daughter, Mrs. Madeline Tourelle. None of the other regular employees of Blue Water ever set foot inside this establishment. Instead, they all report to remote locations, from which they leave for work at other "establishments", that is, on vessels offshore, and they are paid at locations remote from Blue Water's office. Therefore, while the cooks and galley hands are employees of Blue Water's enterprise, they are not employees of the Heritage Avenue establishment. All of the sales of Blue Water's catering service are made from, and all payments therefor are received at, Blue Water's office in Bedell's Heritage Avenue home.

Plaintiff's contention that Bedell's home should not be considered as an independent place of business, rather that it is but one component of a single establishment composed

of the home plus however many jack-up vessels owned by whichever customers who use Blue Water's cooks at any particular time does not comport with ordinary business usage. Plaintiff's contention flies in the face of its own "Interpretative Bulletin", 29 C.F.R. § 779.23, which says:

> As used in the Act, the term "establishment," which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business . . . . As appears more fully elsewhere in this part, this is the meaning of the term as used in sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b), and 14 of the Act.

Blue Water's office on Heritage Avenue is "a distinct physical place of business" and thus is an establishment; the jack-up vessels on which the cooks work are also separate establishments of Blue Water's enterprise, even though the vessels are not owned by Blue Water. Blue Water's sales were generated from its sales office. They cannot be considered as being assigned to customers' vessels. The "mom and pop" exclusion is here applicable.

Employees Exempt as Seamen

29 U.S.C. § 213(b)(6) exempts from coverage "any employee employed as a seaman" but does not define "seaman" for purposes of the Act. 29 C.F.R. § 783.32 does, however, refer to the term "seamen" as members of the crew, such as "cooks". Here the evidence showed that the cooks work on jack-up rigs, which are seagoing vessels. The vessels are documented by the Coast Guard. They are used for transportation from the shores of Louisiana to places outside of Louisiana, i.e., the outer continental shelf. The work of the cooks, feeding the rest of the crew, is just as essential to the operation of the vessel as is the work of any other person serving aboard the vessel. While aboard the vessel, the cooks are subject to the authority, direction, and control of the master of

the vessel. Though these cooks may well be "seamen" as that term is construed under the Jones Act, such is not necessarily so under the Fair Labor Standards Act. This issue was addressed in *Dole v. Petroleum Treaters, Inc.*, 876 F.2d 518 (5th Cir. 1989) wherein the Court found the definitions of "seamen" in the aforesaid Acts to be separate and independent of each other. *Id.* at 520. The Court also determined, pursuant to 29 C.F.R. § 783.31 that one is "employed as a seaman" if he performs service which is rendered primarily as an aid in the operation of a vessel as a means of transportation. *Id.* at 521. In the matter *sub judice* the cooks do not meet such requirements and, accordingly, defendants' claim that its cook employees are exempt seamen fails.

New Orleans, Louisiana, this 9th day of August, 1990.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 89-1527

SECTION "E"

ELIZABETH DOLE, Secretary of Labor,
United States Department of Labor

versus

LESLIE N. BEDELL, an Individual and
BLUE WATER MARINE CATERING, INC., a Corporation

JUDGMENT

[Filed Aug. 9, 1990]

Considering the record, the law, evidence, memoranda, and argument of counsel, and for the reasons assigned,

IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment herein in favor of defendants, Leslie N. Bedell and Blue Water Marine Catering, Inc., and against plaintiff, Elizabeth Dole, Secretary of Labor, United States Department of Labor, dismissing plaintiff's suit, with costs.

New Orleans, Louisiana, this 9th day of August, 1990.

/s/ Marcel Livaudais, Jr.
MARCEL LIVAUDAIS, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3706

LYNN MARTIN,
Secretary of Labor,
Plaintiff-Appellant,

versus

LESLIE N. BEDELL and
BLUE WATER MARINE CATERING, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(April 21, 1992)

Before WISDOM, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ John Minor Wisdom
United States Circuit Judge